IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.03.2006

CORAM:

THE HONOURABLE MR.JUSTICE R.BALASUBRAMANIAN
AND
THE HONOURABLE MR.JUSTICE P.P.S.JANARTHANA RAJA

Tax Case (Appeal) Nos.99 to 101 of 2002

M/s.Poompuhar Shipping Corporation
Limited,
473, Anna Salai,
Chennai-600 035. .... Appellant

Vs.

The Joint Commissioner of Income Tax,
Special Range VI,
Chennai. .... Respondent

Appeals under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras 'C' Bench, in I.T.A. Nos.319, 320 & 321(Mds)/2001 dated 23.11.2001 for the assessment years 1986-87, 1987-88 and 1994-95.

This petition sought to be presented to this Court to revise the order of the Income Tax Appellate Tribunal "C" Bench, Chennai-34, ITA.No.319,320 and 321/MDS/2001 dated 23.11.2001 as against the order of the Commissioner of Income Tax (Appeals) V, Chennai-34 dated 31.1.2001 ITA.No.120,114 and 115/2000-2001 as against the order of the Joint Commissioner of Income Tax, Special Range VI, Madras-34 dated 27.3.2000, G.I.No.9-P/86-87,87-88,94-95 as against the order of the Deputy Commissioner of Income Tax, Special Range, IV, Madras-34 dated 28.2.1989, GI.No.9-P86-87, 87-88, 94-95.

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For Appellant : Mr.V.Ramachandran,
Senior Counsel
for M/s.Anitha Sumanth

For Respondent : Mrs.Pushya Sitaraman

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JUDGMENT

P.P.S.JANARTHANA RAJA, J.

The present appeals are filed under Section 260A of the Income Tax Act, 1961 at the instance of the assessee against the order passed in I.T.A. Nos.319, 320 & 321(Mds)/2001 dated 23.11.2001 by the Income Tax Appellate Tribunal, Madras 'C' Bench. These appeals came up before this Court and this Court admitted the appeals on 26.02.2003 and formulated the following substantial questions of law:-

> "1. Whether a reserve created in the later years would be available for the utilisation even if purchases are made in the earlier years?
>
> 2. Whether on the facts and in the circumstances of the case, the Tribunal is right in law in holding that the acquisition of the ships M.V.TAMIL PERIYAR, M.V.TAMIL KAMARAJ and the Dredger cannot be held to have satisfied the requirement of Section 32A, and the withdrawal of investment allowance granted is justified? And
>
> 3. Whether on the facts and in the circumstances of the case, the Tribunal is right in law in not considering the acquisition of the Dredger in 1990 subsequent to the creation of the reserve as being sufficient compliance with the provisions of Section 32A to the extent of its cost and whether on the facts and in the circumstances of the case, the Appellant having acquired three Vessels subsequent to the acquisition of the Vessel in respect of which investment allowance was granted to it cannot be deemed to have complied with the requirement of Section 32A of the Income Tax Act and consequently, become eligible to the benefit of investment allowance under Section 32A of the Income Tax Act?"

2. The facts leading to the above questions of law are as under:

i) The relevant assessment years are 1986-87, 1987-88 and 1994-95. The assessee is a company wholly owned by the Government of Tamil Nadu, engaged in the business of plying / chartering ship facilities. Some of the ships are owned by it and others are chartered. The plying is mainly between internal ports of India.

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The chief commodity carried is coal which is taken from other ports and delivered to Tuticorin, mainly on behalf of Tamil Nadu Electricity Board. During the year 1985-86, relevant to the assessment year 1986-87, the assessee company purchased, in August 1985, a ship known as 'M.V.Tamil Anna' at a cost of Rs.32,75,67,973/-. The assessee claimed investment allowance of Rs.8,18,91,993/- for the assessment year 1986-87. During the year ended on 31st March 1987, the company purchased a ship known as 'M.V.Tamil Periyar' on 30.09.1986 at a cost of Rs.39,63,80,428/- and 'M.V.Tamil Kamaraj' at a cost of Rs.40,00,26,286/- in March 1997, as per the details given below:-

1. 'M.V.Tamil Periyar' cost	Rs.39,63,80,428/-
2. 'M.V.Tamil Kamaraj' cost	Rs.40,00,26,286/-
Total...	Rs.79,64,06,714/-
Add: Addition to cost because of exchange fluctuation	Rs. 6,32,43,353/-
	Rs.85,96,50,067/-

ii) The total investment allowance to which the assessee company was entitled to in respect of the above two ships was Rs.21,49,12,516/-. In addition to the aforesaid three ships, the assessee company purchased Dredger on 20.08.1990 for a sum of Rs.87,98,435/-. The assessee company debited to the profit and loss account and credited to the investment allowance reserve account the following amounts:-

Sl.No.	Assessement Year	Amounts
1.	1986-87	Rs. 86,52,447/-
2.	1987-88	Rs. 1,43,295/-
3.	1992-93	Rs.11,89,41,592/-
4.	1993-94	Rs. 8,58,75,046/-
5.	1994-95	Rs.21,16,52,404/-
	Total...	Rs.42,52,64,784/-

The Assessing Officer originally allowed the claim of the investment allowance of the assessee company in the assessment years 1986-87, 1987-88 and 1994-95, but subsequently he invoked the provisions of Section 155 read with Section 154 and withdrew the investment allowance granted earlier on the ground that the assessee company had not utilised the reserve for the acquisition of ships within the period of ten years.

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3. Aggrieved by the order of the Assessing Officer, the the assessee company filed an appeal before the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals) dismissed the appeal and confirmed the order of the Assessing Officer. Aggrieved by the same, the appellant filed an appeal to the Income Tax Appellate Tribunal. The Income Tax Appellate Tribunal confirmed the order of the lower authority and dismissed the appeal filed by the assessee.

4. The learned counsel appearing for the assessee submitted that the investment allowance is granted under Section 32A. The object of creation of a reserve and utilisation of an amount equal to the amount transferred to the reserve is to ensure that an asset is acquired and the amount is not utilised for any other purposes. The learned counsel further submitted that the creation of the reserve is only a mere book entry. The requirement of law is only that subsequent to the year in which the investment allowance is granted or the assessee is entitled to the investment allowance consequent on the acquisition of a new asset, the assessee should obtain any other specified asset of an amount equal in value to the extent of the reserve. There is no requirement that there should be an identity between the amount transferred to reserve and funds utilised to acquire the new asset. The only requirement is that the assessee should acquire an asset on any date subsequent to the acquisition of the asset in respect of which the investment allowance is claimed and the value of the asset so acquired should be equal to or in excess of the amount of reserve that the assessee is required to create under Section 32A. Applying the above, it could be seen that the assessee had acquired four Vessels in the following order:

1. 'M.V. Tamil Anna'	...	02.08.1985
2. 'M.V. Tamil Periyar'	...	30.09.1986
3. 'M.V. Tamil Kamaraj'	...	08.01.1987
4. Dredger	...	20.08.1990

It would be noted that the cost of the vessel 'M.V. Tamil Periyar' covers the amount of investment allowance that was created in respect of the ship 'M.V. Tamil Anna'. The investment allowance granted in the case of 'M.V. Tamil Anna' is a sum of Rs.8,18,91,973/- and the reserve was only 75% thereof. The cost of the ship 'M.V. Tamil Periyar' was Rs.39,63,80,428/- without taking into account the addition to the cost on account of exchange fluctuation. In respect of the ship 'M.V.Tamil Periyar', the investment allowance was approximately Rs.10 Crores and the reserve was 75% thereof while the cost of 'M.V. Tamil Kamaraj', acquired in

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January 1987, was Rs.40,00,26,286/-. Further it was argued that Section 32A is an beneficial and incentive provision and hence, the Court must interpret liberally and he relied on the Supreme Court judgment reported in 196 ITR 188 in the case of Bajaj Tempo Ltd. Vs. C.I.T.

5. The learned counsel for the Department submitted that the acquisition of the ships could not be held to have been made by utilising the investment allowance reserves which came to be created much later. The creation of investment allowance reserve thus being a much later occurrence, rules out the possibility of these reserves having been utilised for the ships at an earlier stage. Hence, the utilisation of reserve could not have preceded the creation of reserve itself.

6. We heard both the counsel. The details regarding the value of the asset as well as creation of reserve are as under:-

Dates & Events	Particulars of Asset	Price (Rs.)	I.A. Availed
August '85	M.V.Tamil Anna	32.75 Crores	-
1986-87	Investment allowance availed by creation of reserve.	-	86,52,447
September '86	M.V.Tamil Periyar	39.63 Crores	-
March '87	M.V.Tamil Kamaraj	40.00 Crores	-
1987-88	Investment allowance availed by creation of reserve.	-	1,43,295
August '90	Dredger	87.98 lakhs	-
1992-93	Investment allowance availed by creation of reserve.	-	11,89,41,592
1993-94	Investment allowance availed by creation of reserve.	-	8,58,75,046
1994-95	Investment allowance availed by creation of reserve.	-	21,16,52,404

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In the present case, the investment allowance reserves were created much later to the date of acquisition of the new ships and it could not be said that these ships were purchased out of the reserve fund, which was created much later. No doubt the beneficial provision of Section 32A is to be interpreted and applied liberally, but any such interpretation or liberality could not go beyond the provisions of the Section itself. While allowing an incentive the section is to be liberally interpreted, but at the same time if the conditions specified in the incentive section are not fulfilled, while withdrawing the benefit already allowed, the assessee cannot expect any further concession. According to Section 32A, the first occurrence should be the purchase of eligible asset followed by the creation of investment allowance reserve at a specified percentage of the cost of the ship. The next step would be the utilisation of the investment allowance reserve in the purchase of new eligible asset within a specified period of ten years next following the previous year in which the ship was acquired. In the present case, the assessee had purchased the new ships ('M.V. Tamil Periyar' and 'M.V. Tamil Kamaraj') well before the creation of the investment allowance reserve in respect of the original ship, namely, 'M.V. Tamil Anna'.

7. The argument of the learned counsel for the assessee that the purchases of the Vessels 'M.V.Tamil Periyar' and 'M.V. Tamil Kamaraj' during the year 1986-87 are to be treated as out of the investment allowance reserve created much later, appears to be putting the cart before the horse. No doubt the investment allowance reserve created need not be earmarked and kept apart to be utilised only in the purchase of the new ship but can be utilised for the purposes of the business as specified in the section itself. It does not mean that the assessee can claim without creating the reserve, that it had utilised the reserve in the acquisition of new ship, much before the creation of such reserve itself. The other argument of the counsel for the appellant that the requirement of law is only that the assessee should acquire an asset (new asset) on any date subsequent to the acquisition of the asset (original ship) in respect of which the investment allowance is claimed and the value of the asset so acquired (new ship) should be equal to or in excess of the amount of reserve that the assessee is required to create under Section 32A (in respect of the original ship). These arguments could not be accepted in view of Section 32A (4)(a), which reads as follows:

> "Investment allowance reserve account to be utilised -
> for the purpose of acquiring, before the expiry

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> of a period of ten years next following the previous year in which the ship or aircraft was acquired or the machinery or plant was installed, a new ship or new machinery or plant (other than machinery or plant of the nature referred to in clauses(a), (b) and (d) of the second proviso to sub-section (1)) for the purposes of the business of the undertaking.

Eventhough Section 32A permits creation of reserve in subsequent years due to insufficiency of profit for creation of reserve, it is nowhere stated in the section that the reserve can be created in respect of original ship, subsequent to the acquisition of the new ships in satisfaction of the utilisation of reserve in respect of the original ship purchased. Also, from a reading of the above section, it is clear that the investment reserve amount is to be utilised for the purpose of acquiring new ship. In this case, the ships were acquired before creation of the reserve. Hence, there is a violation of the above provision of law. Also, we do not find anything in Section 32A permitting the assessee to purchase a new asset in satisfaction of the utilisation of the reserve created in respect of an originally purchased asset even without creating such reserve in respect of the original asset purchased. A combined reading of Sections 32A, 155(4A) and 154 will clearly show that if an assessee fails to utilise the investment allowance reserve created against the purchase of an original ship within a period of ten years from the year of purchase of the original ship in purchase of a new ship, the assessee is entitled to lose the benefit given under Section 32A originally. In the present case, the assessee had not purchased the new ship after the creation of the reserve in respect of the ship originally purchased. On the other hand, even before the creation of the reserve, in respect of the original ship, purchase had been completed (spread over the various assessment years). The assessee company had acquired new ships and is trying to link those purchases to the subsequent creation of the reserve, in respect of the old ship.

8. In the light of the above reasoning, we are of the view that the acquisition of the ships 'M.V. Tamil Periyar' and 'M.V. Tamil Kamaraj' could not be held to have been made by utilising the investment allowance reserve which came to be created much later. A non existent reserve could not be said to have been utilised. In other words, the utilisation of reserve could not have preceded the creation of reserve itself. Therefore, we find no error or infirmity in the order of the Tribunal and hence we hold that the orders of the lower authority in all these years as regards the withdrawal of the benefit given under Section 32A by invoking the

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provisions of Section 154 read with Section 155(4A) of the Income Tax Act is in accordance with law. In view of the above reasoning, we answer the Question No.1 in favour of the Revenue, against the assessee. Now we take up Question No.3. In respect of Question No.3, it was fairly stated by the counsel for the Revenue that the Dredger was purchased in August 1990 for a sum of Rs.87.98 lakhs and the same was purchased only out of the reserves created in the years 1986-87 and 1987-88, of Rs.86,52,000/- and Rs.1,43,000/- respectively. Hence, the said Dredger was purchased out of the reserve already created in these years. Hence the assessee is entitled to investment allowance to that extent. Hence, we are answering Question No.3 in favour of the assessee, against the Revenue. Now we take up Question No.2. The second question deals with two parts. The first part is with regard to the ships, M.V. Tamil Periyar and M.V.Tamil Kamaraj and the second part is with regard to the Dredger. In respect of the first part of the second question, we are of the view that the authorities below are right in withdrawal of investment allowance granted in respect of M.V.Tamil Periyar and M.V.Tamil Kamaraj. Also we have considered the same in detail while answering Question No.1. Hence we answer the first part of the second question in favour of the Revenue and against the assessee. With regard to the second part of the second question, we have already considered the same in detail while answering Question No.3 and hence, we answer the second part of the second question in favour of the assessee and against the Revenue. No costs.

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Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1.The Assistant Registrar
Income Tax Appellate Tribunal
Madras "C" Bench
III Floor, Rajaji Bhavan
Besant Nagar
Chennai-600 090.

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2.The Secretary,
Central Board of Commercial Taxes
New Delhi.

3.The Commissioner
Income Tax (Appeals)V
121, Mahatma Gandhi Road
Chennai-34.

4.The Deputy Comissioner (Appeals)
of Income Tax and Commissioner
Income Tax (Appeals)V
Chennai-600 034.

5.The Joint Commissioner
Income Tax
Special Range VI
Chennai-34.

6.The Deputy Commissioner
Income Tax
Special Range VI
Chennai-34.

+ three ccs to M/S.Anitha Sumanth, Advocate Sr.No.13683.

MS (CO)
RSM/17.4.2006

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